Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1299

FOUR WINDS, INC., *Petitioner.*

vs.

INDIANA AERONAUTICS COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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	)
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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner, Four Winds, Inc., respectfully asks this Court to issue a writ of certiorari to review the final judgment of the Supreme Court of Indiana which reversed the judgment of the lower court with instructions to said lower court to grant judgment for the appellant therein, Indiana Aeronautics Commission.

THE OPINION BELOW

The opinion of the Supreme Court of Indiana appears at 368 NE2d 1340 and a copy of it is annexed hereto as Appendix A. The Indiana Supreme Court's denial of the petitioner's Petition for Rehearing is appended hereto as Appendix B.

STATEMENT OF JURISDICTION

The decision and judgment of the Indiana Supreme Court was entered on October 31, 1977. On November 21, 1977, within the time allowed by Indiana law, petitioner filed his Petition for Rehearing in the Indiana Supreme Court and the same was denied on December 22, 1977.

The statutory provision believed to confer upon this court, jurisdiction to review the judgment in question by writ of certiorari is Title 28, United States Code, section 1257 (3).

QUESTIONS PRESENTED

1. Whether the due process clause of the Fourteenth Amendment precludes the

states from imposing an excise tax and exempting therefrom certain property also exempt from the imposition of personal property taxation where such exemption is specifically precluded by the State's Constitution.

2. Whether the Equal Protection Clause of the Fourteenth Amendment precludes the states from permitting the imposition of an excise tax while certain property is exempt therefrom merely because it is exempt from an ad valorem personal property tax, when such exemption is specifically precluded by the State's Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States-
Amendment 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES BEING QUESTIONED

Indiana Code of 1971 6-6-6.5-12. Effective January 1, 1976, there is hereby imposed an annual license excise tax upon taxable aircraft, which tax shall be in lieu of the ad valorem property tax levied for state or local purposes. No taxable aircraft shall be assessed as personal property for the purpose of the assessment and levy of personal property or shall be subject to ad valorem taxes, beginning with taxes for the year of 1975 payable in 1976 and thereafter. (Acts 1975, P.L. 68, § 1, p. 555)

Indiana Code of 1971 6-6-6.5-13. (a) As the basis for measuring the tax imposed by this chapter, the commission shall classify every taxable aircraft in

its proper class according to the following classification plan:

CLASS	DESCRIPTION
A	Piston-driven, non-pressurized aircraft
B	All other aircraft

(b) The tax imposed under this chapter is based on the age, class, and maximum landing weight of the taxable aircraft. Except as provided in subsection (c) of this section, the amount of tax imposed on the taxable aircraft is based on the following table:

Aircraft registered in 1976

Age	Class A	Class B
0-4 Years	$.08/lb	$.18/lb
5-8 Years	$.07/lb	$.16/lb
9-12 Years	$.06/lb	$.14/lb
13-16 Years	$.05/lb	$.12/lb
16 and over	$.04/lb	$.10/lb

Aircraft registered in 1977

Age	Class A	Class B
0-4 Years	$.07/lb	$.15/lb
5-8 Years	$.06/lb	$.13/lb
9-12 Years	$.05/lb	$.115/lb
13-16 Years	$.04/lb	$.10/lb
16 and over	$.03/lb	$.08/lb

Aircraft registered in 1978

Age	Class A	Class B
0-4 Years	$.055/lb	$.12/lb
5-8 Years	$.05/lb	$.11/lb
9-12 Years	$.04/lb	$.095/lb
13-16 Years	$.03/lb	$.08/lb
16 and over	$.025/lb	$.06/lb

Aircraft registered in 1979 or thereafter

Age	Class A	Class B
0-4 Years	$.04/lb	$.09/lb
5-8 Years	$.035/lb	$.08/lb
9-12 Years	$.03/lb	$.07/lb
13-16 Years	$.025/lb	$.06/lb
16 and over	$.02/lb	$.05/lb

(c) If a taxable aircraft was assessed under IC 1971, 6-1 for 1974 property taxes payable in 1975, the annual excise tax imposed on that aircraft under this chapter for 1976, 1977, or 1978 equals the lesser of:

(1) the 1974 property taxes so assessed against the taxable aircraft; or

(2) the annual excise tax computed under subsection (b) of this section.

The owner of a taxable aircraft who desires to obtain the benefits of the excise tax limit prescribed in this subsection must, at the time he registers the aircraft, present a statement from the appropriate township assessor which indicates the 1974 property taxes so assessed against the aircraft. (Acts 1975, P.L. 68, § 1, pp. 555-556)

Indiana Code of 1971 6-6-6.5-9. The provisions of this chapter pertaining to registration shall not apply to the following:

(a) an aircraft owned by and used exclusively in the service of any government or any political subdivision thereof, including the government of the United States, any state, territory, or possession of the United States, or the District of Columbia;

(b) an aircraft owned by a dealer and held solely for purpose of resale. However, the dealer must have complied with the provisions of section 10 of this chapter;

(c) an aircraft owned by a resident of another state and registered in accordance with the laws of such other state. However, the aircraft shall not be exempt from registration if operated within this state for a period of one hundred eighty (180) days or more;

(d) an aircraft upon which this state is prohibited by the constitution or the laws of the United States from imposing the excise tax imposed by this chapter;

(e) an aircraft the owner of which is exempt from ad valorem personal prop-

erty taxation under the laws of this state; or

(f) an aircraft owned or operated by an air carrier certificated under Federal Air Regulation Part 121 or an aircraft owned or operated by a scheduled air taxi operator who is certified under Federal Air Regulation Part 135 and who is not a resident of this state. (Acts 1975, P.L. 68, § 1, p.554)

CONCISE STATEMENT OF THE CASE

The petitioner filed a Complaint for declaratory and injunctive relief against payment of the tax imposed upon its aircraft by the Indiana Aircraft Excise Tax Act of 1975, Indiana Code of 1971, §§ 6-6-6.5-1 through 22. Respondent, the State of Indiana Aeronautics Commission appealed from this judgment to the Indiana Supreme Court and the Indiana Supreme Court reversed said judgment with instructions to grant judgment for respondent herein and denied the petitioner's

Petition for Rehearing on the dates previously given.

In 1975, the Indiana General Assembly passed the Indiana Aircraft Excise Tax Act of 1975. Indiana Code of 1971, §§ 6-6-6.5-1 through 22. This act imposed an excise tax on certain aircraft, and required registration thereof; however, certain aircraft were exempt from the excise tax and under the wording of the exemption provision of said act, some of these exempted aircraft were exempted merely because they were also exempted from an ad valorem personal property tax. The trial court found for petitioner tax payer on its Complaint for declaratory and injunctive relief against the tax imposed. The Indiana Supreme Court found that the Act as passed did not deny equal protection and due process of law, notwithstanding the fact that such double exemption is explicitly prohibited by the Indiana Constitution.

REASONS FOR GRANTING THE WRIT

Two (2) reasons are hereinafter given for granting the requested writ. They are recited in combination, for the sake of brevity and relate in the same order as the "questions presented" heretofore listed.

I

THE SUPREME COURT OF INDIANA HAS HELD IN THIS CAUSE THAT AN ARBITRARY EXEMPTION FROM ANY TAX WHATSOEVER, IN THE NATURE OF AN EXCISE OR PROPERTY TAX, IS PERMISSIBLE ALTHOUGH SPECIFICALLY PROHIBITED BY ARTICLE 10, SECTION 1 OF THE INDIANA CONSTITUTION. THIS HOLDING SPECIFICALLY VIOLATES THE PROVISIONS OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The court below considered the Indiana Aircraft Excise Tax Act of 1975, Indiana Code of 1971, §§ 6-6-6.5-1 through 22, as not violative of the requirements of equality in taxing property contained in Article 10, Section 1 of the Indiana

Constitution; and, therefore, not violative of the Fourteenth Amendment to the United States Constitution.

A state may grant exemptions from taxation, so long as the grant does not violate rights secured by the Constitution. *New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs.* (1905) 199 U.S. 1, 50 L.Ed. 65, 25 S.Ct. 705. Where the power to exempt is arbitrarily exercised, it is precluded by the Fourteenth Amendment to the United States Constitution. *Ohio Oil Co. v. Conway* (1930) 281 U.S. 146, 74 L.Ed. 775, 50 S.Ct. 310; *Louisville Gas & E. Co. v. Coleman* (1928) 277 U.S. 32, 72 L.Ed. 770, 48 S.Ct. 423.

Article 10, Section 1 of the Indiana Constitution provides as follows:

"1. Assessment and taxation.- (a) The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation of all property, both real and personal. The General Assembly may exempt from property taxation any of the following classes:

(1) Property being used for municipal, educational, literary, scientific, religious or charitable purposes;

(2) Tangible personal property other than property being held for sale in the ordinary course of a trade of business, property being held, used or consumed in connection with the production of income, or property being held as an investment;

(3) Intangible personal property.

(b) The General Assembly may exempt any motor vehicles, mobile homes, airplanes, boats, trailers or similar property, provided that an excise tax in lieu of the property tax is substituted therefore."

This section does not permit an express exemption of any property from the general property tax rate other than that specifically named therein. *Wright v. Steers* (1962) 242 Ind. 582, 179 N.E.2d 721. This section further provides that

where property is exempted, such property must be subject to an excise tax in lieu of the property tax.

Notwithstanding the foregiong, in addition to a specific exemption for scheduled air carriers, the Act provides as follows:

* * *

"The provisions of this chapter pertaining to registration shall not apply to the following:

* * *

(e) An aircraft the owner of which is exempt from ad valorem personal property taxation under the laws of this state. . . ."

* * *

Indiana Code of 1971 6-6-6.5-9(e)

Petitioner, Four Winds, Inc., would respectfully submit that the Court in its opinion overlooked this exemption. In considering such exemption it can only be concluded that the Act must fall as it attempts, in violation of the Constitution, to exempt property other than that set out in Article 10, Section

1, from taxation. *Wright v. Steers*, supra.. No class of property can be exempted from taxation unless there is a specific exemption by law. *Stark v. Kreyling* (1934) 207 Ind. 128, 188 N.E. 680. The Indiana Supreme Court further stated in *Wright*:

"So long as the Constitution reads as it does, the legislature had no authority to exempt from the general property tax any property other than that specifically limited in Article 10, Section 1, *Stark v. Kreyling*, supra; the *State ex rel. Tieman, et al. v. The City of Indianapolis* (1879) 69 Ind. 375, 35 Am. Rep. 223; *Miles V. Dept. of Treasury* (1935) 209 Ind. 172, 199 N.E. 372, 101 A.L.R. 1359, Appeal Dism. 298 U.S. 640, 56 S.Ct. 750, 80 L.Ed. 1372. . ."

[*Wright v. Steers*, 179 N.E.2d 725.]

Article 10, Section 1 of the Indiana Constitution clearly states that airplanes may be exempt from the property

tax; however, they may only be exempt where an excise tax is substituted in lieu thereof. The Indiana Aircraft Excise Tax Act of 1975, with the exemptions provided, clearly contravenes Article 10, Section 1 of the Indiana Constitution, as it exempts aircraft *if they are also exempt from personal property tax.*

The State Legislature has no power to grant such exemption in defiance of the foregoing constitutional limitations, and must be prohibited from doing so. *Huntington v. Worthen* (1887) 120 U.S. 97, 30 L.Ed. 588, 7 S.Ct. 469; *St. Louis I.M. & S.R. Co. v. Berry* (1885) 113 U.S. 465, 28 L.Ed. 1055, 5 S.Ct. 529.

It is patently obvious that there is no rationale whatsoever for the exemption contained in the Act. Therefore, the Act amounts to a denial of equal protection of the law and a taking of property without due process of law, under the Fourteenth Amendment to the United States Constitution. The result obtained is that petitioner may not own and

operate its own aircraft without being subjected to a severe penalty, that others are exempted from in contravention of Article 10, Section 1 of the Indiana Constitution.

CONCLUSION

Certiorari should be granted and the appropriate Writ should be issued to the Indiana Supreme Court in this cause because the law ennunciated herein by the lower court amounts to a denial of due process and equal protection under the Fourteenth Amendment to the United States Constitution.

MAGNUSON, DEIN & HAMMES

BY _____
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APPENDIX

INDIANA AERONAUTICS
COMMISSION, Appellant,

v.

AMBASSADAIR, INC., and
FOUR WINDS, INC.,
Appeellees.

No. 1276 S 429

Supreme Court of Indiana

Oct. 31, 1977.

DeBruler, Justice.

Four Winds, Inc. and Ambassadair, Inc., appellees, two air travel clubs, sought declaratory and injunctive relief against payment of the tax upon their aircraft provided for by the Indiana Aircraft Excise Tax Act of 1975. Ind. Code §§ 6-6-6.5-1 through 22 (Burns 1976 Supp.). The trial court granted judgment for these taxpayers and the Indiana Aeronautics Commission appealed.

We deal in this appeal with the protection which may be afforded aircraft owners by the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Article 1, Sections 12 and 23 of the Indiana Constitution, against the exation of the tax on aircraft. This

statute removes the property tax burden from aircraft and imposes another tax burden on them. This burden is distributed among aircraft owners on the basis of the age and maximum landing weight of their planes. These criteria function as major factors in a formula for calculating the tax charge, which formula is set forth in Ind. Code § 6-6-6.5-13(a) and (b) as follows:

"(a) As the basis for measuring the tax imposed by this chapter [6-6-6.5-1— 6-6-6.5-22] the commission shall classify every taxable aircraft in its proper class according to the following classification plan:

CLASS	DESCRIPTION
A	Piston-driven, non-pressurized aircraft
B	All other aircraft

(b) The tax imposed under this chapter is based on the age, class and maximum landing weight of the tax-

able aircraft. Except as provided in subsection (c) of this section, the amount of tax imposed on the taxable aircraft is based on the following table:

Aircraft registered in 1976

Age	Class A	Class B
0-4 Years	$.08/lb	$.18/lb
5-8 Years	$.07/lb	$.16/lb
9-12 Years	$.06/lb	$.14/lb
13-16 Years	$.05/lb	$.12/lb
16 and over	$.04/lb	$.10/lb

Aircraft registered in 1977

* * * * * * * * * * * * * * * * * *

Aircraft registered in 1978

* * * * * * * * * * * * * * * * * *

Aircraft registered in 1979 or thereafter

Age	Class A	Class B
0-4 Years	$.04/lb	$.09/lb
5-8 Years	$.035/lb	$.08/lb
9-12 Years	$.03/lb	$.07/lb
13-16 Years	$.025/lb	$.06/lb
16 and over	$.02/lb	$.05/lb"

According to this provision, after the class selection is made according to subsection (a), the tax charge on a plane is determined by multiplying a stated money rate, which diminishes as the age of an aircraft increases, by the maximum landing weight of the plane measured in pounds. Other provisions of the statute require annual registration of taxable aircraft and the return of tax dollars collected to the local taxing districts in which the aircraft are usually located when not in operation. Ind. Code §§ 6-6-6.5-3 and 6-6-6.5-21. Also pertinent to this appeal are the provisions of the act which completely exempt regularly scheduled airlines such as Eastern and TWA, Ind. Code § 6-6-6.5-9(f), and those which grant a temporary three year tax reduction in the case of aircraft assessed for 1974 property taxes payable in 1975. Ind. Code § 6-6-6.5-13 (c). The trial court concluded that the statute could not be applied to appellees consistent with the requirements of equal protection and due process.

The special findings of the trial court upon which his conclusions were reached show that Four Winds, Inc., owns a 1962 Convair 880 which has a maximum landing weight of 150,000 pounds and a value of $225,000, and that Ambassadair, Inc. owns a 1959 Boeing 720 which has a maximum landing weight of 175,000 pounds and a value of $250.000. The Convair was brought to Indiana in October, 1975, and the Boeing was brought here in September, 1973. The tax charge on the two planes for 1976 would be about $18,000 each. If the planes were subject to the property tax, and if the assessed value for property tax purposes were the same as their value found by the trial court, the property tax charge would be about one-half of this charge for 1976. A Learjet, having a value of from between $400,000 and $1,000,000 and a maximum landing weight of 12,000 pounds would pay about $1,400. The trial court interpreted the statute as ignoring the actual value of aircraft in its formula for determining this charge. The trial court

further found that the excise tax charge for 1976 against appellees was so large as to be confiscatory and an undue burden and hardship on them.

The manner in which the findings, most of which are merely descriptive of the legislative arrangements in the statute, were utilized or deemed essential to the equal protection determination of the trail court is not clear. In spite of the difficulty which this lack of clarity poses to our appellate function, we believe that the classification of aircraft by age and weight, and the classification of craft for total and partial exemption were central to that determination and we proceed to test them by appropriate constitutional standards.

In order to place the equal protection claim in this case upon a proper footing and to dispel some notion implicit in arguments of counsel, it is important to note and emphasize that we deal here with the limitation imposed by Article 1, Section 23, of the Indiana Constitution and the Equal Protection and

Due Process Clauses of the Fourteenth Amendment upon the taxing power of this State. They do not impose any specific limitation upon the power of Indiana to classify persons and things for tax purposes other than to prohibit arbitrary classifications. They do not require this State to maintain any particular scheme of property or excise taxes, or to adopt any particular classifications for tax purposes. For example, and appropos here, the commands of equal protection would not mandate Indiana to maintain the rigid requirements of equality in taxing property mandated by Article 10, Section 1 of the Indiana Constitution, or to adopt any particular bases upon which to calculate a tax charge. *Puget Sound Power & Light Co. v. King County* (1924) 264 U.S. 22, 44 S.Ct. 261, 68 L.Ed 541; *Eavey Company v. Department of Treasury* (1939) 216 Ind. 255, 24 N.E.2d 268; *Lutz v. Arnold* (1935) 208 Ind. 480, 193 N.E.2d 840. In *Bell's Gap Railroad Co. v. Pennsylvania* (1890) 134 U.S. 232, 237, 10 S.Ct. 533, 535, 33 L.Ed. 892, in

words often quoted, the Supreme Court of the United States said:

> "The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways.
>
> * * * * * * * * * * * * * * * * * * *
>
> We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of equal taxation."

And in *Allied Stores of Ohio, Inc. v. Bowers* (1959) 358 U.S. 522,526-27, 79 S.Ct. 437, 440-41, 3 L.Ed. 480, that Court stated:

> "Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Four-

teenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value."

The Court then went on to state the standard to be applied in testing state tax legislation for equal protection purposes:

> "But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some

> ground of difference having a fair and substantial relation to the object of the legislation.'" (Citations omitted.) 358 U.S. at 527, 79 S.Ct. at 441.

Thus, under these decisions and those hereafter cited in which the traditional test of equal protection is appropriate, the Equal Protection Clause neither condemns nor approves specific criteria for tax classifications in the abstract. It is only in the context of a particular statute that classification and the criteria which define them can be judged against the equal protection clauses. In view of this, the statute under consideration here is not invalid as a denial of equal protection simply because it utilizes the criteria of age and maximum landing weight, or simply because it may not utilize value, as none of these three criteria are required or rejected, per se.

In the court below appellees' successful equal protection claim was based primarily upon the contention that the

classification of aircraft by age and maximum landing weight for the purposes of determining this tax charge, as applied to their aircraft, resulted in an invidious discrimination. Appellees' aircraft are old, and have relatively small market values and have very great maximum landing weights. As a consequence the charges on their craft are very high, and are in fact higher than the charges on lighter and more valuable aircraft. The defects identified by appellees in this legislative arrangement stem from the manner in which it deals with the "value" of aircraft. On the one hand appellees have claimed that the arrangement impermissibly ignores value altogether in setting the tax charge. Alternatively it has also been argued that the purpose of the statute is to base the tax charge solely on "value", and that age and maximum landing weight are not rationally suited for this purpose. With regard to this latter posited legislative objective, the chairperson of the appellant Commission

testified that prior to, and while acting as such chairperson, he had helped draft this very statute and had guided it through the legislative processes culminating in its enactment. He stated that the drafters had not given consideration to a use factor, such as the actual number of take-offs and landings which a craft might make, and that they believed that the age and weight criteria were the best way of determining "taxable value". He also described how the Legislature "felt" about the tax formula and other provisions. Appellees rely heavily on this evidence. This type of evidence may be relevant and useful in determining legislative purpose in a case such as this, however, it does not bind the court. Even in the face of such testimony, a court must go ahead and make an independent determination of whether any reasonably conceivable purpose exists which would support the constitutionality of the classification employed. *Dandridge v. Williams* (1970) 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d

491, and authorities therein cited. The presumption of constitutionality and the regard which courts must maintain for their limited role in judging the constitutionality of statutes require us to go beyond what would be necessary for a determination of legislative intent for purposes of making a proper legal application of a statute.

The general character of the act would indicate that its overall objective is to raise revenues to support airports and governmental services rendered to operational aircraft, and to distribute the tax burden to aircraft owners. The tax only applies to aircraft which the owner intends to fly. The tax dollars collected are returned to the taxing districts in which the aircraft are kept when not in operation, or in other words, where airports are maintained.

Maximum landing weight identifies the maximum weight at which a plane can safely take off and land. This term would identify the lift which the power

of the engines and the structural design of the body are capable of generating. Thus, one might reasonably believe that the maximum landing weight of ar aircraft increases in direct proportion to increases in the power of the engines and the area of those parts of the body designed to create lift. Larger aircraft require greater space in which to maneuver, to park, to load, and to unload. The larger an aircraft is, the more likely it is to require assistance in safely maneuvering on the ground and in the air. It calls for greater fire and police protection. Maximum landing weight would also be a primary determinant of the force applied by an aircraft to runways and aprons of any airport it was using and thus of the degree to which it participates in the deterioration of those facilities. These are but examples of the specific characteristics of aircraft and the airport facilities required by them which the term "maximum landing weight" subsume.

The criterion of "age" in this

legislative arrangement also exerts its influence in the determination of the charge. Its influence is much less than that of maximum landing weight. Under this criterion the rate per pound of maximum landing weight falls as the age of the craft increases. Age is obviously a concession to value and usefulness. Obviously, the older an aircraft becomes, the lower its dollar value is likely to fall. And as well one may reasonably believe that the usefulness of an aircraft diminishes as it grows older. It would become less able to satisfy the expectancies of passengers. The zones in which it could be relied upon to operate safely would tend to diminish. An older aircraft is likely to be regarded as less reliable, and therefore its use may reasonably be expected to diminish. Ind. Code § 6-6-6.5-22 would appear to make further concessions to property-type concepts. In pertinent part, that provision reads:

> "The excise tax imposed by this chapter is hereby determined to be

> equivalent to an average property tax rate of nine dollars ($9.00) on each one hundred dollars ($100.00) taxable value. . . ."

We are faced here with indications of legislative objective which do not all point in the same direction. However, they appear to us to reasonably support the conclusion that the Legislature intended to distribute this tax burden among aircraft owners on the basis of the special governmental facilities and services upon which they may reasonably be expected to call and which they may reasonably be expected to receive. This is the dominant objective, however, from the exemption afforded aircraft from the property tax and other indications, one must agree that property concepts are present here and are likewise being served. But in our opinion the form in which those concepts are present and the manner in which they are served does not alter the essential object of the act as we view it for constitutional purposes.

We reject the conclusions of the appellees that the Legislature either intended to totally ignore "value" in its formula, or that it indeed selected value as the sole underlying basis for distributing the burden of this tax.

According to the testimony at trial and the briefs, at least eleven states utilize the criterion of weight in imposing registration fees on aircraft based in their borders. Some of these fees amount to several thousands of dollars per year. There is therefore nothing unusual or suspicious about its use in the statute before us. In using this criterion in determining legislative objective, we pointed out the characteristics of aircraft and the facilities they require which are delineated by maximum landing weight. The larger an aircraft is the more airport it requires for safe operation. This tax is imposed on craft which the owners intend to operate. Maximum landing weight would be a reasonable index of the extent to which an aircraft would

participate in the deterioration of runways and aprons. It would define the area of the runways and aprons which an aircraft would use in taking off and landing, maneuvering on the ground and parking. The larger the load capacity of an aircraft, the more it will call upon airport facilities for handling and storing cargo and for providing for the safe and convenient movement of passengers. Traffic problems in and around the area of the airport are undoubtedly exacerbated by the presence of larger aircraft. Larger aircraft require more fuel and therefore the storage of greater amounts of fuel at the airport. The noise and vibrations which more powerful aircraft generate play a role in determining construction specifications and costs for buildings in and about the airport. We have already pointed out the criterion of age has a degree of pertinence to the use which a plane may be expected to make of airport facilities and airways. The likelihood that older aircraft are regarded as less reliable will work a diminution of

their actual use. Age works a reduction in the tax charge in part because the plane is not expected to make use of public facilities as much as newer aircraft. Upon these considerations, and under our duty to accede to facts which may reasonably be conceived and which support the reasonableness of the classification, we find that the age-weight formula is defensible and an apt index of the extent to which an aircraft may reasonably be expected to call upon governmental facilities and services provided the aviation community.

As has been previously pointed out, equal protection does not require "an iron rule of equality" or the maintenance of "precise, scientific uniformity with reference to composition, use or value." *Allied Stores of Ohio, Inc. v. Bowers*, supra. It is not significant from a constitutional point of view that counsel or the court may believe that there are more appropriate criteria for this legislative purpose. It is enough that this classification further a legitimate

state interest. Under the circumstances here we need not examine the arguments made by appellant, because we are satisfied that this classification is reasonable and does not constitute a denial of equal protection.

In his findings, the trial court focused upon the special benefits granted by Ind. Code § 6-6-6.5-13(c). That proviso provided:

> "(c) If a taxable aircraft was assessed under IC 1971, 6-1[6-1-1-1—6-1-66-8] for 1974 property taxes payable in 1975, the annual excise tax imposed on that aircraft under this chapter for 1976, 1977, or 1978 equals the lesser of:
>
> (1) the 1974 property taxes so assessed against the taxable aircraft; or
>
> (2) the annual excise tax computed under subsection (b) of this section."

He also mentioned the existence of the exemption provided regularly scheduled airlines in Ind. Code § 6-6-6.5-9(f).

It is not clear what these two classifications played in the reasoning processes by which the trial court arrived at his conclusions of law and judgment, if any. Partial and complete categorical exemptions of this sort are within the taxing power of states and often upheld against equal protection challenges. *Carmichael v. Southern Coal & Coke Co.* (1937) 301 U.S. 495, 57 S.Ct. 868, 91 L.Ed. 1245; *Taxpayer's Lobby v. Orr* (1974) 262 Ind. 92, 311 N.E.2d 814; *State ex rel. Lewis v. Smith* (1902) 158 Ind. 543, 63 N.E. 25, 63 L.R.A. 116. In the *Carmichael* case, the Supreme Court said:

> "A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is a conceivable state of facts which would support it." 301 U.S. at 509, 57 S.Ct. at 872.

The first exemption above would

appear to apply to persons whose aircraft were assessed in 1974 and who are applying for registration of those same aircraft in 1976. It would be reasonable to believe that those same aircraft had been assessed in 1975 as well, and that the string of assessments had created in the owners of such aircraft a legal interest in paying a particular amount of property tax on their planes. The object of this exemption appears to be to give recognition to the interests of taxpayers arising from actual assessments of their planes during the period of transition from the property tax to the new tax, and the distinctions made in identifying the taxpayers entitled to the benefit bestowed appear to be rationally based and well within the discretion of the Legislature. The looseness with which the beneift and the class are defined does not make this provision invalid. *Gafill v. Bracken, Auditor* (1924) 195 Ind. 551, 145 N.E. 312.

The decision of the Legislature manifest in the total exemption granted

regularly scheduled airlines simply suggests that the State wishes to avoid discouraging airlines engaged in providing regular passenger services to the public. This is a legitimate interest of the State which is furthered by the exemption granted. *Kahn v. Shevin* (1974) 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189; *Lehnhausen v. Lake Shore Auto Parts Co.* (1973) 410 U.S.356, 93 S.Ct. 1001, 35 L.Ed.2d 351; *Madden v. Kentucky* (1940) 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590.

We conclude that the great deference given to tax legislation and the classifications they may employ by the Fourteenth Amendment and Article 1, Section 23 of the Indiana Constitution dictates that this statute is not constitutionally invalid as a denial of equal protection, and the findings of the trial court were insufficient to support a contrary conclusion.

As has previously been noted in this opinion, the trial court concluded that appellees had been successful in showing that the tax charge imposed was

an invidious discrimination "as applied" to them. While the foregoing paragraphs completely resolve the equal protection claims made, we have considered what further character may have been supplied the judgment of the trial court by use of the words "as applied." In tax cases, those words are to be found in connection with claims arising out of the misuse of authority by administrative officials engaged in enforcing valid tax statutes. The claims of Four Winds, Inc., and Ambassadair, Inc., are not based upon discriminatory administrative action. In the case of *Nashville C. & St. L. Ry. v. Browning* (1940) 310 U.S. 362, 60 S.Ct. 968, 84 L.Ed. 1254, the Supreme Court established a short-form test for such claims. A claim of this sort cannot be successfully maintained if the grievance upon which it is based is common to the whole class. Here, appellees are clearly members of the class subject to the tax. Their craft fall within a specific age category. Their claim of unconstitutional discrim-

ination is based upon their ability to identify taxable aircraft which are lighter and have greater value than their own, and consequently will pay a smaller tax under the age-weight criterion. This ability is common to the whole class and therefore the circumstances here do not merit the invocation of the protection of the Fourteenth Amendment *on this basis*.

While appellees have no burden on appeal to establish the validity of the judgment of the trial court, appellee, Ambassadair, Inc., has presented a new contention in its brief which was not raised in the trial court and which formed no basis for the judgment. It contends that the statute is unconstitutional in violation of Article 10, Section 1 in that it is in fact a property tax and impermissibly fails to impose a uniform and equal rate of property assessment as required by such provision, and that the trial court "could have properly found Ind. Code §6-6-6.5-13" to have been unconstitutional on this basis. No such findings

were made. Appellees assigned no cross-errors and appellant filed no reply brief. In fact, appellant was under no duty under our rules to file a reply brief and counter this contention. Ind.R.App.P. 8.3(C). We are reluctant to make a definitive constitutional determination where the record and briefs are limited. *Board of Commissioners of Howard County v. Kokomo City Plan Commission* (1975) 263 Ind. 282, 330 N.E.2d 92. Moreover, this new attack on the statute would not support the judgment of the trial if sustained. The judgment declared that the statute is unconstitutional as applied to appellees. This new contention, if sustained, on the other hand, would result in the invalidation of the entire statute. Ambassadair's new contention is wholly outside the issues in this case. It is therefore not before us for resolution.

Appellees were also successful in the trial court in obtaining a judgment based upon the conclusion that the tax imposed upon their aircraft is barred by

the Due Process Clause of the Fourteenth Amendment and Article 1, Section 12, of the Indiana Constitution because it is too great. In *A. Magnana Co. v. Hamilton* (1934) 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109, it was held that the Due Process Clause of the Fourteenth Amendment would not, except in rare and special instances, limit the size of tax charges imposed by the states. In drawing the line beyond which a state may not go without transgressing due process in this regard, the court said:

> "That clause is applicable to a taxing statute . . . only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.
> * * * * * * * * * * * * * * * * * *
> Nor may a tax within the lawful power of a state be judicially

> stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses . . . unless, indeed , as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state."

Article 1, Section 12, of the State Constitution would limit the power of the state in the same manner. *Thomas v. Lauer* (1949) 227 Ind. 432, 86 N.E.2d 71.

Under the statute here, the tax upon appellees' aircraft amounted to $18,000 for the year 1976 and is scheduled to diminish over the succeeding three year period to a point where it levels off at about one-half that amount. Appellees would appear to have little cause to complain about a tax at that rate, because a tax at that level would be commensurate with the general

property tax to which it could have been subject. As it is the 1976 tax is a considerable hardship amounting to about 8% of the market value of the aircraft; however, upon consideration of the provisions of the statute and the impact on appellees, we find no attempted exercise of the power to destroy or confiscate the property or business of appellees, but are satisfied that the burden imposed is indeed a tax. In the recent case of *City of Pittsburgh v. Alco Parking Corp.* (1974) 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed. 132, a local 20% tax on the gross receipts of parking lots was upheld against a similar claim. That tax appears to be even more severe than the one to which appellees have been subjected.

The judgment of the trial court is reversed with instructions to grant judgment for the appellant.

IN THE
SUPREME COURT OF INDIANA

INDIANA AERONAUTICS COMMISSION,	)
Appellant,	)
vs.	)
AMBASSADAIR, INC., and FOUR WINDS, INC.,	)
Appellees.	)

Petition for rehearing denied this 22 day of December, 1977.

/s/ Richard M. Givan
Chief Justice of
the Indiana
Supreme Court

Supreme Court, U. S.
FILED
APR 14 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1299

FOUR WINDS, INC., *Petitioner.*

vs.

INDIANA AERONAUTICS COMMISSION, *Respondent.*

SUPPLEMENTAL APPENDIX

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STATE OF INDIANA)	IN THE MARION COUNTY
)SS:	
COUNTY OF MARION)	SUPERIOR COURT 5
	CAUSE NO. S 576-233
FOUR WINDS, INC.,	)
Plaintiff,	)
vs.	)
INDIANA AERONAUTICS COMMISSION,	)
Defendants.	)

COMPLAINT FOR INJUNCTION

Comes now the Plaintiff, Four Winds, Inc., an Indiana corporation, in person and by counsel, and does hereby file its verified Complaint For Injunction in the words and figures as follows:

1. That Plaintiff is an Indiana Not-for- Profit Corporation, organized and operating a private airplane travel club in the State of Indiana, and more specifically from Weir Cook Airport, Indianapolis, Indiana.

2. That said Plaintiff is the owner of one 1962 Convair airplane Model 880-22M, which is based and operated out of Weir Cook Airport, Indianapolis,

Indiana.

3. That the Indiana General Assembly, during 1975, enacted Public Law No. 68, which requires the Aeronautic Commission of the State of Indiana to register and collect an excise tax on all aircraft based in the State of Indiana for 180 days per year or more, beginning with January 1, 1976.

4. That said Convair 880, above described, was acquired by the Plaintiff in this action during the Fall of 1975, for the approximate price of Two Hundred and Twenty-Five Thousand Dollars ($225,000.00).

5. That under the classification of said excise tax, as published in Public Law 68 in the 1975 General Assembly, said aircraft is presently subject to payment of the excise tax on or before February 29, 1976, in the approximate amount of Eighteen Thousand and Six Hundred Dollars ($18,600.00).

6. That comparative to other aircraft, with a much greater value, but a lesser weight, the excise tax payment due

on those other planes would be substantially less than that due on the plane owned by Plaintiffs in this action, and further would have no relevancy whatsoever to the stated value, not the number of flights made, nor the use of landing strips at various airports in the State of Indiana.

7. That Sections 12 and 13 of said Public Law 68, as enacted by the 1975 General Assembly, are unconstitutional as being in violation of the Fourteenth Amendment of the Constitution of the United States, in that it effectively deprives the Plaintiff in this action of property without due process of law, and further that it denies the Plaintiff in this action equal protection of the laws, and more specifically the taxation under said laws.

8. And, that Plaintiff further alleges that said Section 12 and 13 of Public Law 68, as enacted by the 1975 General Assembly, is unconstitutional under provisions of the Constitution of the State of Indiana, and further under

the Constitution of the United States of America, by virtue that said excise tax as it applies to this Plaintiff would be an arbitrary and capricious application, and an unjust taking of property without any solid basis or foundation upon which said tax was enacted to be fair and equitable to all parties subject to said tax.

WHEREFORE, Plaintiff does hereby pray that a temporary restraining order be issued by this Court against the Aeronautics Commission of the State of Indiana, from enforcing said excise tax at this time, and further be restrained from disallowing said Plaintiff to operate its airplane without said registration statement as secured by the payment of said excise tax due February 29, 1976, in the approximate amount of Eighteen Thousand and Six Hundred Dollars ($18,600.00), and further that said Sections 12 and 13 of said Public Law 68, as enacted by the 1975 General Assembly, be declared unconstitutional and in violation of those guaranteed

rights as above specified to this Plaintiff, and for all other relief proper in the premises.

/s/ Glenn Jones
Four Winds, Inc.

STATE OF INDIANA)
SS:
COUNTY OF MARION)

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 27th day of February, 1976.

/s/ Becky Ann Richter
Notary Public

My Commission Expires:

January 30, 1980

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STATE OF INDIANA) IN THE MARION COUNTY
) SS:
COUNTY OF MARION) SUPERIOR COURT No.5

FOUR WINDS, INC. and AMBASSADAIR, INC.,

Plaintiffs,

vs.

INDIANA AERONAUTICS COMMISSION,

Defendant.

PLAINTIFF'S ARGUMENT

MR. DEIN: We simply feel that the evidence clearly indicates that the tax imposed on these two (2) Plaintiffs works a confiscation of their property because it fails to take into consideration the real attributes of value as applied to aircraft. Those real attributes of value are basically the equipment of the aircraft, the electronics on the aircraft, some reasonable appraisal method by which aircraft could be valued. We felt that the law does not take into consideration the fact that we're dealing here with very sophisticated equipment and that having failed to set up any reasonable proceedure for the assessment of any actual value figure, that the law is therefore arbitrary and capricious. And we think, as applied to these particular Plaintiffs, that they were left out of the exemption provisions of the law by a Legislative error. It's quite clear that this is true, as the witness truthfully, I think, testified. They realized their error after the initial legislation was passed. Went back to the Legislature

and attempted to have the situation corrected, and were unsuccessful. And, the law, as written, does not give the Indiana Aeronautics Commission any discretion in adjusting these inequities, and therefore the proper recourse for these two (2) petitioners is to have the law declared unconstitutional as it applies to them. And to properly restrain or enjoin the Indiana Aeronautics Commission from, in effect, depriving these two (2) petitioners of their property without due process of law. And denying them equal protection of the law.

STATE OF INDIANA) SS: IN THE MARION COUNTY
COUNTY OF MARION) SUPERIOR COURT 5
CAUSE NO. S 576-233

FOUR WINDS, INC. and AMBASSADAIR, INC.,
Plaintiffs,
vs.
INDIANA AERONAUTICS COMMISSION,
Defendant.

PLAINTIFF, FOUR WINDS, INC. POST-HEARING BRIEF

The Aircraft Excise Tax imposed by Public Law 68 passed in the 1975 General Assembly of the State of Indiana is an invidious discrimination as applied to Four Winds, Inc., Petitioner, herein.

The tax is predominately to provide funds for construction and improvement of air transport facilities in the State of Indiana, by providing funds to various counties, taxed against aircraft based

therein.

The use of the facilities in Marion County, Indiana, so provided is: Weir Cook Airport, is utilized 99.44% by companies whose aircraft are specifically exempt from taxation under this act. No commercial carrier will be taxed under this Act based on exclusionary exemption. Petitioner herein has one of possibly five (5) commercial type aircraft in Indiana that are taxed however under this Act. This tax imposed will be sufficient to fully exhaust the value of the Petitioner's aircraft in twelve (12) years with no allowance for depreciation being used in the computation with an aircraft expected life of twenty-five (25) years. This amounts to a confiscation of the aircraft.

The director of the Indiana Aeronautics Commission has openly admitted, under oath, in this proceeding, that this tax was in fact conficatory, further that it was a legislative omission or error that this Petitioner was not also exempted as were similar aircraft carriers

and that this tax unfairly and invidiously discriminates against this Petitioner.

The director of the Indiana Aeronautics Commission further testified that there were between five and ten thousand aircraft in Indiana paying a total tax of approximately Five Hundred Thousand Dollars ($500,000.00) per year, and that approximately five (5) non-exempt carriers would have to pay approximately One Hundred Thousand Dollars ($100,000.00) of this total tax collected, or approximately twenty percent (20%) therein. This, he further testified was a mistake and inherently unfair.

The Court's have consistently held that excise taxes that invidiously discriminate will not be permitted. The tax in this matter is applied to the Petitioner herein, does exactly that; as testified by the very agency charged with its enforcement.

The application of an excise tax based entirely on weight is invidious discrimination as applied to these Petitioners, because such a method ig-

nores the real values of the property tax and fails to consider the actual extent of the exercise of the privilege conferred. *Gaffil v. Bracken* (1942) 145 N.E. 312, 195 Ind. 551.

Petitioner would further argue that with the enactment of the excise tax under Public Law No. 68 that it more than doubles, in fact, the personal property tax that Petitioner's would have paid under previously established laws, held to be equitable, fair, and not a penalty, by previous judicial review. And, further, that many aircraft owners under this act are given the option to stay with the assessed value and pay a property tax on the basis of the plane, rather than pay an excise tax which might be higher. This alternative is not given to the Petitioner herein.

Petitioner further argues that this excise tax is in violation of the Fourteenth Amendment of the Constitution of the United States in that it effectively deprives them of their property in a confiscatory manner without due process of

law, and further it does not give them equal protection of the laws as compared with other individuals subject to this tax, whom are either excluded or exempted, or given alternative method of taxation as written in the tax law due to the manipulative law being at the time that this law was passed by the General Assembly and further in contravention of the Petitioner's Constitutional Rights in that planes with a much greater value are taxed a substantially lower rate.

Previous to the enactment of this Public Law 68 by the 1975 General Assembly, taxation of Petitioner's aircraft would have been in accordance with Article 10 Section 1, of the Constitution of the State of Indiana, however, by the mere titling this legislative enactment as a "excise tax", the State is circumvented by mere mirage the constitutional requirement of that above noted section of the Indiana Constitution that there shall be a just evaluation for taxation of all property, both real and personal. This is nothing more than a mere scheme

by special interest groups to shift the base of the tax burden away from themselves to individuals, such as the Petitioner herein.

CONCLUSION

Public Law No. 68 as enacted by the 1975 General Assembly is unconstitutional as it applies to this Petitioner; is in violation of the Fourteenth Amendment and further that it is an invidious discrimination as applied to this Petitioner.

Respectfully submitted,

/s/ James P. Quinn
Attorney for the
Plaintiff, Four Winds,
Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon William E. Daily, Assistant Attorney General, Room 219 State Capitol Building, Indianapolis, Indiana 46204, this 5th day of

April, 1976, and upon Edgar H. Lamb, 3170 Indiana National Bank Tower, Indianapolis, Indiana.

/s/ James P. Quinn

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STATE OF INDIANA)
)SS:
COUNTY OF MARION)

IN THE MARION COUNTY
SUPERIOR COURT 5

CAUSE NO. S576-233

FOUR WINDS, INC. and AMBASSADAIR, INC.,

Plaintiffs,

vs.

INDIANA AERONAUTICS COMMISSION,

Defendant.

FINDINGS OF FACT

1. Four Winds, Inc., is an Indiana Not-for-Profit Corporation, organized under the Indiana Not-for-Profit Corporation Law, in approximately July of 1975.

2. Further, that Four Winds, Inc., is an air travel club that is based in the Indianapolis area, and operates specifically as a club only to its members.

3. That Four Winds, Inc., operates

from Combs Gates hangar at Weir Cook Airport, Indianapolis, Indiana.

4. That even though the Convair 880 operated by Four Winds, Inc., is based at Combs Gates hangar, the aircraft is still out of the State of Indiana, approximately four (4) days of each week of the year.

5. That Four Winds, Inc., operates under a FAA Certificate under Part 123. And, further that all of its operations, as far as crews, aircraft, maintenance, etc. are controlled by the FAA.

6. That the Convair 880, owned by Four Winds, Inc., was built in 1962.

7. That the value of the 1962 model Convair 880 is approximately Two Hundred and Twenty-Five Thousand Dollars ($225,000.00), which in fact was the price paid on the lease with option to purchase agreement.

8. That under the provisions of Public Law 68 that were passed by the 1975 General Assembly, Four Winds, Inc., would be required to pay approximately Eighteen Thousand Six Hundred

Dollars ($18,600.00) in excise taxes to the Indiana Aeronautics Commission for certification by the State and registration by the State, of said plane for operation during 1976 calendar year.

9. Further, that this tax is based on a maximum landing weight of one hundred and fifty-five thousand pounds (155,000 lbs) at a twelve cents ($.12) per pound charge under the excise tax provisions of the above described law during the year of 1976.

10. That under a normal personal property tax assessment that has been previously existing in the State of Indiana, for purposes of taxation, the tax on this Convair 880, 1962 Model, would have been for 1976 due and payable in 1977, approximately Seven Thousand Two Hundred Dollars ($7,200.00).

11. That comparatively, a Lear Jet that would have value of, from anywhere of Four Hundred Thousand ($400,000.00) to One Million Dollars ($1,000,000.00), and would weigh approximately twelve thousand pounds would only be taxed under

said Public Law 68, as passed by the 1975 General Assembly, in the approximate amount of One Thousand Four Hundred Dollars ($1,400.00).

12. That if said Four Winds, Inc., must pay said excise tax in the amount of Eighteen Thousand Six Hundred Dollars ($18,600.00), it would create an undue burden on said Club, in that they are financially unable to pay the same.

13. That said tax in the amount of Eighteen Thousand Six Hundred Dollars ($18,600.00) was due from Four Winds, Inc., on or before February 29, 1976, for registration and operation of the plane under Indiana State Law during 1976.

14. That as of February 29, 1976, Four Winds, Inc., had not owned or had possession of said aircraft, above described, as the Convair 880, for a period even near one hundred and eighty days (180).

15. Furthermore, neither had Four Winds, Inc., had possession of said air-

craft for a period of one hundred and eighty (180) days during the year 1975.

16. That Four Winds, Inc., pays landing fees to Weir Cook Airport each and every time that it lands on said strips, based on the landing weight of the aircraft.

17. That based on the taxation to the aircraft in the approximate amount of Eighteen Thousand Six Hundred ($18,600.00) Dollars per year, and further based on the cost of said Convair 880 in the amount of Two Hundred and Twenty-five Thousand Dollars ($225,000.00), in approximately twelve (12) years, Four Winds, Inc., would have paid in taxes to the Indiana Aeronautics Commission, the same amount of money as they paid for their plane at the intital purchase.

18. That Mr. Henry A. Kezimier is at this time Executive Director of the Indiana Aeronautics Commission.

19. That it is part of the Executive Director of the Aeronautics Commission's duties to propose legislation to the In-

diana General Assembly.

20. That Mr. Henry A. Kezimier, Executive Director of the Indiana Aeronautics Commission, had served as General Chairman of the Aviation Association of Indiana, and as a member of the founding Board of Directors of the Aviation Association of Indiana, and had worked with those groups for about seven (7) years to draft this proposed legislation and get it passed in the form of Public Law No. 68.

21. That Mr. Kezimier assisted in the specific drafting and preparation of this particular legislation, as enacted in Public Law No. 68.

22. That during the course of the Legislative Hearings considering the potential passage of this now enacted Public Law 68, there were representatives of the major commercial transport companies, such as TWA, Eastern Airlines and others.

23. Further, that these groups, such as TWA, Eastern and other major commercial transports, lobby each year

at the Indiana General Assembly to insure that they do not get stuck with any additional taxes from the State of Indiana on their aircraft.

24. That there is an exclusionary section in Public Law 68 that applies to the aircraft owned or operated by an air carrier certified under Federal Air Regulation Part 121. And, further certified under Regulation Part 135. And, further that these are scheduled airlines such as Eastern, TWA, etc.

25. That each of these scheduled airlines, such as Allegheny, North Central, Skystream, etc., who use the Indiana Airport facilities at Weir Cook Airport more than Four Winds, Inc., but yet are exempted from this taxation under Public Law 68.

26. That it is Mr. Kezimier's decision that the best way to tax airplanes is by weight and age, without any consideration as to cost value, or otherwise.

27. That when this Public Law 68 was enacted by the 1975 General Assembly,

as promoted by Kezimier, Four Winds, Inc., and other clubs were not taken into consideration as to facts that they had large aircraft of a very heavy weight, but a very small value comparatively.

28. Thus this tax under Public Law 68, as it applies to Four Winds, Inc., is an unfair tax.

29. In the promotion and passage of Public Law 68, there was no consideration given to the use factor, such as the number of flights and take-offs. Furthermore, it was even thought that this at that time was irrelevant.

30. That by passage of Public Law 68 and the enforcement thereon by the Indiana Aeronautics Commission, this effectively punishes Four Winds, Inc., in the further regard that they also pay a landing fee as do other exempt transport planes.

31. That Four Winds, Inc., is punished by a penalty tax or an excise tax for basing its plane in the State of Indiana, at least 180 days a year.

32. That the Airlines of Eastern, Delta, and Allegheny would have between fifteen to twenty (15-20) airplanes in Indianapolis Weir Cook Airport on a given business day. Furthermore, that said airline companies have planes based at Indianapolis Weir Cook Airport, more often than does Four Winds, Inc., even though they do not pay any excise fees.

33. That this excise tax under Public Law 68 is not fair to Four Winds, Inc., and that there is probably an extenuating circumstance where this tax is applied to Four Winds, should be different than applied under the formula.

34. That this excise tax as applied to Four Winds, Inc., is in fact a penalty tax.

35. That during the legislative sessions and committee hearings, none of the private flying clubs, including Four Winds, Inc., was invited to attend the hearings and testify on behalf of or against the proposed legislation, which became enacted as Public Law 68. However, the other major transport airlines were

present and invited.

36. That in the event the excise tax is not paid on aircraft based in Indiana, then there is an obligation to pay the personal property tax.

37. That the property tax, under Public Law 68, is an alternative tax in the event the excise tax is not paid.

38. That Mr. Kezimier went back to the 1976 General Assembly to seek rectification of Public Law 68 in terms of amending said Law to include the alternative tax clearly as that was the intention from the promoters and authors of said Public Law 68. However, due to the length of the session in 1976, this was unable to be completed.

39. That the imposition of the excise tax under Public Law 68, as applied to Four Winds, Inc., is confiscatory in nature, and imposes a hardship on Four Winds.

40. That Public Law No. 68 as enacted by the 1975 General Assembly does not give Four Winds, Inc., the option of paying either the excise tax or the

property tax, whichever is lesser, as it does other aircraft.

41. That Four Winds, Inc., travels in interstate commerce, by virtue of purchasing gasoline, food, beverages, and labor throughout the United States and foreign countries.

Respectfully submitted,

/s/ James P. Quinn
Attorney for Plaintiff,
Four Winds, Inc.

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STATE OF INDIANA) IN THE MARION COUNTY
) SS:
COUNTY OF MARION) SUPERIOR COURT 5

CAUSE NO. S576-233

FOUR WINDS, INC. and AMBASSADAIR, INC.,

Plaintiffs,

vs.

INDIANA AERONAUTICS COMMISSION,

Defendant.

CONCLUSIONS OF LAW

1. That Public No. 68 as enacted by the 1975 General Assembly is unconstitutional as in violation of the Fourteenth Amendment of the Constitution of the United States as applied to this Plaintiff in respect to a taking of its property in a confiscatory manner without due process of law, and further that it is the direct denial of the Plaintiff's right to equal protection of the laws of the United States and

of the State of Indiana.

2. That said Public No. 68 as enacted by the 1975 General Assembly effectively creates an invidious discrimination as applied to this Plaintiff, and therefore is unconstitutional under the Constitution of the State of Indiana, and further under the Constitution of the united States of America.

3. That said tax is confiscatory as applied to this Plaintiff, that said tax is a penalty tax as applied to this Plaintiff, that said tax is unfair as applied to this Plaintiff, and that said tax is inherently discriminatory as applied to this Plaintiff.

THEREFORE, said tax is unconstitutional as interpreted through the Constitututution of the United States and of the Constitution of the State of Indiana, as applied to this Plaintiff.

Respectfully submitted,

/s/ James P. Quinn
Attorney for Plaintiff,

Four Winds, Inc.

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STATE OF INDIANA) IN THE MARION COUNTY
)SS:
COUNTY OF MARION) SUPERIOR COURT 5

CAUSE NO. S576-233

FOUR WINDS, INC., and AMBASSADAIR, INC.,

Plaintiffs,

vs.

INDIANA AERONAUTICS COMMISSION,

Defendant.

ORDER

Comes now the plaintiffs, Ambassadair, Inc., and Four Winds, Inc., by counsel, and the Court having heard evidence under oath on the plaintiff's complaint, the Court having consolidated said hearing, without objection, under Trial Rule 65 (A)(2), the Court now approves and issues the following findings of fact:

(H.I.)

And further, pursuant to said findings of fact the Court now approves

and issues the following conclusions of law:

(H.I.)

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Public Law 68 enacted by the Indiana General Assembly 1975, IC1971 6-6-7-13 as applied to these plaintiffs is hereby declared unconstitutional and declared null and void under the Constitution of the State of Indiana; and further that the preliminary injunction previously herein is now made permanent, and further that the Indiana Aeronautics Commission is hereby enjoined from enforcing the collection of the subject tax in accordance with Public Law 68 as to these plaintiffs, and further that the Indiana Aeronautics Commission is hereby enjoined from refusing to issue proper registration and license as to these plaintiffs, if said plaintiffs otherwise qualify.

SO ORDERED
April 9, 1976

/s/ Michael T. Dugan, II, Judge, Marion Superior Court, No. 5

STATE OF INDIANA) IN THE MARION COUNTY
)SS:
COUNTY OF MARION) SUPERIOR COURT 5

CAUSE NO. S576-223

FOUR WINDS, INC. and AMBASSADAIR, INC.,

Plaintiffs,

vs.

INDIANA AERONAUTICS COMMISSION,

Defendant.

AMENDED FINDINGS OF FACT

1. Four Winds, Inc., is an Indiana Not-for-Profit Corporation, organized under the Indiana Not-for-Profit Corporation Law, in approximately July of 1975.

2. Further, that Four Winds, Inc., is an air travel club that is based in the Indianapolis area, and operates specifically as a club only to its members.

3. That Four Winds, Inc., operates from Combs Gates hangar at Weir Cook

Airport, Indianapolis, Indiana.

4. That even though the Convair 880 operated by Four Winds, Inc., is based at Combs Gates hangar, the aircraft is still out of the State of Indiana, approximately four (4) days of each week of the year.

5. That Four Winds, Inc., operates under a FAA Certificate under Part 123. And, further that all of its operations, as far as crews, aircraft, maintenance, etc., are controlled by the FAA.

6. That the Convair 880, owned by Four Winds, Inc., was built in 1962.

7. That the value of the 1962 model Convair 880 is approximately Two Hundred and Twenty-five Thousand Dollars ($225,000.00), which in fact was the price paid on the lease with option to purchase agreement.

8. That under the provisions of Public Law 68 that were passed by the 1975 General Assembly, Four Winds, Inc., would be required to pay approximately Eighteen Thousand Six Hundred Dollars ($18,600.00) in excise taxes to the

Indiana Aeronautics Commission for certification by the State and registration by the State, of said plane for operation during 1976 calendar year.

9. Further, that this tax is based on a maximum landing weight of one hundred and fifty-five thousand pounds (155,00 lbs.) at a twelve cents ($.12) per pound charge under the excise tax provisions of the above-described law during the year of 1976.

10. That under a normal personal property tax assessment that has been previously existing in the State of Indiana, for purposes of taxation, the tax on this Convair 880, 1962 Model, would have been for 1976 due and payable in 1977, approximately Seven Thousand Two Hundred Dollars ($7,200.00).

11. That comparatively, a Lear Jet that would have value of, from anywhere to Four Hundred Thousand Dollars ($400,000.00) to One Million Dollars ($1,000,000.00), and would weight approximately twelve thousand pounds would only be taxed under said Public

Law 68, as passed by the 1975 General Assembly, in the approximate amount of One Thousand Four Hundred Dollars ($1,400).

12. That if said Four Winds, Inc., must pay said excise tax in the amount of Eighteen Thousand Six Hundred Dollars ($18,600.00), it would create an undue burden on said Club, in that they are financially unable to pay the same.

13. That said tax in the amount of Eighteen Thousand Six Hundred Dollars ($18,600.00) was due from Four Winds, Inc., on or before February 29, 1976, for registration and operation of the plane under Indiana State Law during 1976.

14. That as of February 29, 1976, Four Winds, Inc., had not owned or had possession of said aircraft, above described, as the Convair 880, for a period even near one hundred and eighty days (180).

15. Furthermore, neither had Four Winds, Inc., had possession of said aircraft for a period of one hundred and

eighty (180) days during the year 1975.

16. That Four Winds, Inc., pays landing fees to Weir Cook Airport each and every time that it lands on said strips, based on the landing weight of the aircraft.

17. That Mr. Henry A. Kezimier is at this time Executive Director of the Indiana Aeronautics Commission.

18. That it is part of the Executive Director of the Aeronautics Commission's duties to propose legislation to the Indiana General Assembly.

19. That Mr. Henry A. Kezimier, Executive Director of the Indiana Aeronautics Commission, had served as General Chairman of the Aviation Association of Indiana, and as a member of the founding Board of Directors of the Aviation Association of Indiana, and had worked with those groups for about seven (7) years to draft this proposed legislation and get it passed in the form of Public Law No. 68.

20. That Mr. Kezimier assisted in the specific drafting and preparation of this

particular legislation, as enacted in Public Law No. 68.

21. That during the course of the Legislative Hearings considering the potential passage of this now enacted Public Law 68, there were representatives of the major commercial transport companies, such as TWA, Eastern Airlines and others.

22. That there is an exclusionary section in Public Law 68 that applies to the aircraft owned or operated by an air carrier certified under Federal Air Regulation Part 121. And, further certified under Regulation Part 135. And, further that these are scheduled airlines such as Eastern, TWA, etc.

23. That each of these scheduled airlines, such as Allegheny, North Central, etc., who use the Indiana Airport facilities at Weir Cook Airport more than Four Winds, Inc., but yet are exempted from this taxation under Public Law 68.

24. That it is Mr. Kezimier's decision that the best way to tax airplanes is

by weight and age, without any consideration as to cost value, or otherwise.

25. That when this Public Law 68 was enacted by the 1975 General Assembly, as promoted by Kezimier, Four Winds, Inc., and other clubs were not taken into consideration as to facts that they had large aircraft of very heavy weight, but a very small value comparatively.

26. Thus this tax under Public Law 68, as it applies to Four Winds, Inc., is an unfair tax.

27. In the promotion and passage of Public Law 68, there was no consideration given to the use factor, such as the number of flights and take-offs. Furthermore, it was even thought that this at that time was irrelevant.

28. That by passage of Public Law 68 and the enforcement thereon by the Indiana Aeronautics Commission, this effectively punishes Four Winds, Inc., in the further regard that they also pay a landing fee as do other exempt transport planes.

29. That Four Winds, Inc., is punish-

ed by a penalty tax or an excise tax for basing its plane in the State of Indiana, at least 180 days a year.

30. That the Airlines of Eastern, Delta, and Allegheny would have between [sic] to twenty (15-20) airplanes in Indianapolis Weir Cook Airport on a given business day. Furthermore, that said airline companies have planes based at Indianapolis Weir Cook Airport, more often than does Four Winds, Inc., even though they do not pay any excise fee.

31. That this excise tax under Public Law 68 is not fair to Four Winds, Inc., and that there is probably an extenuating circumstance where this tax is applied to Four Winds, should be different than applied under the formula.

32. That this excise tax as applied to Four Winds, Inc., is in fact a penalty tax.

33. That during the legislative sessions and committee hearings, none of the private flying clubs, including Four Winds, Inc., was invited to attend the hearings and testify on behalf of or

against the proposed legislation, which became enacted as Public Law No. 68. However, the other major transport airlines were present and invited.

34. That in the event the excise tax is not paid on aircraft based in Indiana, then there is an obligation to pay the personal property tax.

35. That the property tax, under Public Law 68, is an alternative tax in the event the excise tax is not paid.

36. That Mr. Kezimier went back to the 1976 General Assembly to seek rectification of Public Law 68 in terms of amending said Law to include the alternative tax clearly as that was the intention from the promoters and authors of said Public Law 68. However, due to the length of the session in 1976, this was unable to be completed.

37. That the imposition of the excise tax under Public Law 68, as applied to Four Winds, Inc., is confiscatory in nature, and imposes a hardship on Four Winds.

38. That Four Winds, Inc., travels

in interstate commerce, by virtue of purchasing gasoline, food, beverages, and labor throughout the United States and foreign countries.

/s/ Michael T. Dugan, II, Judge, Marion County Superior Court No. 5

STATE OF INDIANA) IN THE MARION COUNTY
) SS:
COUNTY OF MARION) SUPERIOR COURT 5

CAUSE NO. S576-233

FOUR WINDS, INC., and AMBASSADAIR, INC.,

Plaintiff,

vs.

INDIANA AERONAUTICS COMMISSION,

Defendant.

AMENDED CONCLUSIONS OF LAW

1. That Public No. 68 as enacted by the 1975 General Assembly is unconstitutional as in violation of the Fourteenth Amendment of the Constitution of the United States as applied to Plaintiff, Four Winds, Inc., in respect to a taking of its property in a confiscatory manner without due process of law, and further that it is the direct denial of said Plaintiff's right to equal protection of the laws of the

United States and of the State of Indiana.

2. That said Public No. 68 as enacted by the 1975 General Assembly effectively creates an invidious discrimination as applied to Plaintiff, Four Winds, Inc., and therefore is unconstitutional under the Constitution of the State of Indiana, and further under the Constitution of the United States of America.

3. That said tax is confiscatory as applied to Plaintiff, Four Winds, Inc., that said tax is a penalty tax as applied to said Plaintiff, that said tax is unfair as applied to said Plaintiff, and that said tax is inherently discriminatory as applied to said Plaintiff.

THEREFORE, said tax is unconstitutional as interpreted through the Constitution of the United States and of the Constitution of the State of Indiana, as applied to Plaintiff, Four Winds, Inc.

/s/ Michael T. Dugan, II, Judge, Marion County Superior Court Room No. 5

Supreme Court, U. S.
FILED
APR 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1299

FOUR WINDS, INC.,
Petitioner,

vs.

INDIANA AERONAUTICS COMMISSION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1299

FOUR WINDS, INC.,
Petitioner,

vs.

INDIANA AERONAUTICS COMMISSION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Respondent, Indiana Aeronautics Commission, respectfully prays this Court to deny issuance of a writ of certiorari to the Indiana Supreme Court, thereby refusing to review the decision entered by that Court in cause number 1276 S 429 on October 31, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana appears at 368 N.E.2d 1340 and is appended to the Petition for Writ

of Certiorari. The Supreme Court of Indiana denied petitioner's Petition for Rehearing and that denial is appended hereto at page A-18. This cause was originally tried in the Superior Court of Marion County, Room No. 5 and the decision of that court is appended hereto at page A-2.

JURISDICTION

Petitioner alleges jurisdiction in this Court pursuant to 28 U.S.C. § 1257(3), ostensibly on the basis of violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment. However, Respondent contends that the argument of the petition is directed, not to the United States Constitution, but to alleged contravention of Article 10, Section 1 of the Indiana Constitution by a state statute. Because Petitioner did not seasonably raise the issue regarding Article 10, Section 1 of the Indiana Constitution, the Indiana Supreme Court had no opportunity to decide the question.

Respondent asserts, therefore, that this Court has no jurisdiction to issue the writ prayed for since no real federal issue has been raised, and since the basic issue of the petition has not been properly presented to the State Supreme Court for review.

QUESTIONS PRESENTED FOR REVIEW

The Respondent would assert that the issue presented at this time is whether the Petitioner has properly presented to this Court a federal question of substance.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 10, Section 1 of the Constitution of the State of Indiana reads as follows:

Assessment and taxation.—

(a) The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal. The General Assembly may exempt from property taxation any property in any of the following classes:

(1) Property being used for municipal, educational, literary, scientific, religious or charitable purposes;

(2) Tangible personal property other than property being held for sale in the ordinary course of a trade or business, property being held, used or consumed in connection with the production of income, or property being held as an investment;

(3) Intangible personal property.

(b) The General Assembly may exempt any motor vehicles, mobile homes, airplanes, boats, trailers or similar property, provided that an excise tax in lieu of the property tax is substituted therefor.

Indiana Code Title 6, Article 6, Chapter 6.5, Section 9 is properly cited IC 6-6-6.5-9 and prior to January 1, 1978, read as follows:

> The provisions of this chapter pertaining to registration shall not apply to the following:
>
> (a) an aircraft owned by and used exclusively in the service of any government or any political subdivision thereof, including the government of the United States, any state, territory, or possession of the United States, or the District of Columbia;
>
> (b) an aircraft owned by a dealer and held solely for purpose of resale. However, the dealer must have complied with the provisions of section 10 of this chapter;

(c) an aircraft owned by a resident of another state and registered in accordance with the laws of such other state. However, the aircraft shall not be exempt from registration if operated within this state for a period of one hundred eighty (180) days or more;

(d) an aircraft upon which this state is prohibited by the constitution or the laws of the United States from imposing the excise tax imposed by this chapter;

(e) an aircraft the owner of which is exempt from ad valorem personal property taxation under the laws of this state; or

(f) an aircraft owned or operated by an air carrier certificated under Federal Air Regulation Part 121 or an aircraft owned or operated by a scheduled air taxi operator who is certified under Federal Air Regulation Part 135 and who is not a resident of this state.

After January 1, 1978, IC 6-6-6.5-9 read as follows:

(a) The provisions of this chapter pertaining to registration and taxation shall not apply to:

(1) An aircraft owned by and used exclusively in the service of:

(i) The United States government;

(ii) A state (except Indiana), territory, or possession of the United States;

(iii) The District of Columbia; or

(iv) A political subdivision of an entity listed in clause (i), (ii), or (iii).

(2) An aircraft owned by a resident of another state and registered in accordance with the laws of that state. However, the aircraft shall not be exempt under this subdivision if it is based inside this

state for a period of one hundred eighty [180] days or more;

(3) An aircraft which this state is prohibited from taxing under this chapter by the constitution or the laws of the United States.

(4) An aircraft owned or operated by a person who is not a resident of Indiana and who is either an air carrier certified under Federal Air Regulation Part 121 or a scheduled air taxi operator certified under Federal Air Regulation Part 135.

(b) The provisions of this chapter pertaining to taxation shall not apply to an aircraft owned by and used exclusively in the service of Indiana or a political subdivision of Indiana. That aircraft must be reported for registration, but the commission will issue the registration without charge.

STATEMENT OF THE CASE

Petitioner initiated this action by filing a complaint for injunction in the Superior Court of Marion County Room No. 5 on February 27, 1976. The complaint is appended hereto at page A-11. The complaint challenges the constitutionality of IC 6-6-6.5-12 and IC 6-6-6.5-13. The complaint does not refer to IC 6-6-6.5-9(e), the statutory provision challenged in the Petition for Writ of Certiorari filed herein. An evidentiary hearing was held on March 9, 1976; and on April 9, 1976, the trial court made findings of fact and conclusions of law and entered judgment. On July 9, 1976, the trial court amended its findings, conclusions and judgment. The Amended Findings of Fact, the Amended Conclusions of Law, and the Amended Order are appended at pages A-2, A-7, A-9. The trial court did not question the constitutionality of IC 6-6-6.5-9(e).

Respondent filed a Motion to Correct Errors in the trial court on August 2, 1976. That motion was overruled on

August 8, 1976. The record of the case was timely filed on October 7, 1976. Respondent filed an Appellant's Brief with the Indiana Court of Appeals on November 3, 1976; and, upon petition by Appellee, the cause was transferred on December 7, 1976, to the Indiana Supreme Court because it involved a constitutional question. Following the granting of a petition for extention of time, Petitioner filed its Brief of Appellee on March 31, 1977. Said brief, which is appended hereto at page A-14, contains no reference to the constitutional issues raised in the Petition for Writ of Certiorari before this Court.

The opinion of the Indiana Supreme Court was rendered on October 31, 1977, and is attached to Petitioner's Writ of Certiorari. A petition for rehearing was filed on November 21, 1977, and is appended hereto at page A-18. The issue regarding IC 6-6-6.5-9(e) and its validity under the Indiana Constitution was first raised in this petition for rehearing which was denied on December 22, 1977. (See page A-1.) Thereafter Petitioner filed its Petition for Writ of Certiorari with this Court.

REASONS FOR DISALLOWANCE OF THE WRIT

I.

THE UNITED STATES SUPREME COURT LACKS JURISDICTION TO ENTERTAIN THE ISSUES AS RAISED BY PETITIONER IN ITS PETITION FOR WRIT OF CERTIORARI

A. The Petition Fails to State a Federal Question

The Petition for a Writ of Certiorari filed herein states that Petitioner is raising questions of Due Process and Equal Protection under the United States Constitution. The Fourteenth Amendment is set forth in Petition under the topic "Constitutional Provisions Involved". A careful examination of the Petition reveals that two sentences of

Petitioner's argument make general reference to the Fourteenth Amendment. The remainder of the argument is directed to the allegation that the Indiana Aircraft Excise Tax Act of 1975 contravenes Article 10, Section 1 of the Indiana Constitution. The Fourteenth Amendment is used only superficially to comply with Title 28, United States Code, Section 1257(3), under which Petitioner attempts to invoke the jurisdiction of this Court. A mere reference to the Equal Protection clause in order to strengthen other objections to a state statute is not sufficient to invoke the jurisdiction of this Court. *Arbuckle v. Blackburn*, 191 U.S. 405 (1903).

Since the real issue involves interpretation of a provision of the state constitution, the decision is not reviewable by the United States Supreme Court. *Swiss Oil Corporation v. Shanks*, 273 U.S. 407 (1926); *Memphis & C. Ry. Co. v. Pace*, 282 U.S. 241 (1930).

B. The Issue Was Not Timely Presented to the State Court

Assuming, *arguendo*, that the Petitioner's argument regarding Article 10, Section 1 of the Indiana Constitution presented a federal question, it was not timely presented to the state court for decision. Petitioner did not raise this issue until its petition for rehearing following the Indiana Supreme Court decision. (Appendix A-18.) Questions first presented to the highest state court on a petition for rehearing come too late for consideration by the federal Supreme Court on certiorari. *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945). It is well settled that the United States Supreme Court will not pass upon a question of constitutionality of a state statute which was not raised in state courts and which those courts had no opportunity to decide. *Adler v. Board of Education*, 342 U.S. 485 (1952); *Beck v.*

Washington, 369 U.S. 541, reh. den. 370 U.S. 965 (1961); *New York ex rel. Cohn v. Graves,* 309 U.S. 308 (1937).

C. The Issue Raised By Petitioner Has Been Rendered Insignificant By the Repeal of the Exemption Challenged

Petitioner alleges that the Act is unconstitutional because a provision of the Indiana Aircraft Excise Tax Act of 1975, IC 6-6-6.5-9(e), exempts from the excise tax all aircraft not subject to *ad valorem* personal property taxation. While it is Respondent's position that Petitioner has grossly misinterpreted the effect of Article 10, Section 1 of the Indiana Constitution as applied to the statutory exemption, Respondent would respectfully point out that subsection (e) of IC 6-6-6.5-9 was repealed by the 1977 Indiana General Assembly. Petitioner's argument is, therefore, rendered devoid of substance and significance. The Supreme Court will not decide issues which have been rendered insignificant by changed circumstances. *Diffenderfer v. Central Baptist Church, Inc.,* 404 U.S. 412 (1971); *Hall v. Beals,* 396 U.S. 45 (1969).

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari to the Supreme Court of Indiana should be denied.

Respectfully submitted,

THEODORE L. SENDAK
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APPENDIX

IN THE
SUPREME COURT OF INDIANA

INDIANA AERONAUTICS COMMISSION,
Appellant,

vs.

AMBASSADAIR, INC., and FOUR WINDS, INC.,
Appellees.

Petition for hearing denied this 22 day of December, 1977.

/s/ Richard M. Givan
Chief Justice of the Indiana Supreme Court

IN THE
MARION COUNTY SUPERIOR COURT
Room No. 5

STATE OF INDIANA } SS:
COUNTY OF MARION }

FOUR WINDS, INC. and AMBASSADAIR, INC., *Plaintiffs,*
vs.
INDIANA AERONAUTICS COMMISSION, *Defendant.*

Cause No. S576-233

AMENDED FINDINGS OF FACT

1. Four Winds, Inc., is an Indiana Not-For-Profit Corporation, organized under the Indiana Not-For-Profit Corporation Law, in approximately July of 1975.

2. Further, that Four Winds, Inc., is an air travel club that is based in the Indianapolis area, and operates specifically as a club only to its members.

3. That Four Winds, Inc., operates from Combs Gates hangar at Weir Cook Airport, Indianapolis, Indiana.

4. That even though the Convair 880 operated by Four Winds, Inc., is based at Combs Gates hangar, the aircraft is still out of the State of Indiana, approximately four (4) days of each week of the year.

5. That Four Winds, Inc., operates under a FAA Certificate under Part 123. And, further that all of its operations, as far as crews, aircraft, maintenance, etc., are controlled by the FAA.

6. That the Convair 880, owned by Four Winds, Inc., was built in 1962.

7. That the value of the 1962 model Convair 880 is approximately Two Hundred and Twenty-five Thousand Dollars ($225,000.00), which in fact was the price paid on the lease with option to purchase agreement.

8. That under the provisions of Public Law 68 that were passed by the 1975 General Assembly, Four Winds, Inc., would be required to pay approximately Eighteen Thousand Six Hundred Dollars ($18,600.00) in excise taxes to the Indiana Aeronautics Commission for certification by the State and registration by the State, of said plane for operation during 1976 calendar year.

9. Further, that this tax is based on a maximum landing weight of one hundred and fifty-five thousand pounds (155,000 lbs.) at a twelve cents ($.12) per pound charge under the excise tax provisions of the above-described law during the year of 1976.

10. That under a normal personal property tax assessment that has been previously existing in the State of Indiana, for purposes of taxation, the tax on this Convair 880, 1962 Model, would have been for 1976 due and payable in 1977, approximately Seven Thousand Two Hundred Dollars ($7,200.00).

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14. That as of February 29, 1976, Four Winds, Inc., had not owned or had possession of said aircraft, above described, as the Convair 880, for a period even near one hundred and eighty days (180).

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17. That Mr. Henry A. Kezimier is at this time Executive Director of the Indiana Aeronautics Commission.

18. That it is part of the Executive Director of the Aeronautics Commission's duties to propose legislation to the Indiana General Assembly.

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20. That Mr. Kezimier assisted in the specific drafting and preparation of this particular legislation, as enacted in Public Law No. 68.

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26. Thus this tax under Public Law 68, as it applies to Four Winds, Inc., is an unfair tax.

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38. That Four Winds, Inc., travels in interstate commerce, by virtue of purchasing gasoline, food, beverages, and labor throughout the United States and foreign countries.

/s/ MICHAEL T. DUGAN, II
Judge Marion County
Superior Court Room No. 5

7-9-76

IN THE
MARION COUNTY SUPERIOR COURT
Room No. 5

STATE OF INDIANA } SS:
COUNTY OF MARION }

FOUR WINDS, INC. and AMBASSADAIR, INC.,
Plaintiffs,

vs.

INDIANA AERONAUTICS COMMISSION,
Defendant.

Cause No. S576-233

AMENDED CONCLUSIONS OF LAW

1. That Public Law No. 68 as enacted by the 1975 General Assembly is unconstitutional as in violation of the Fourteenth Amendment of the Constitution of the United States as applied to Plaintiff, Four Winds, Inc., in respect to a taking of its property in a confiscatory manner without due process of law, and further that it is the direct denial of said Plaintiff's right to equal protection of the laws of the United States and of the State of Indiana.

2. That said Public Law No. 68 as enacted by the 1975 General Assembly effectively creates an invidious discrimination as applied to Plaintiff, Four Winds, Inc., and therefore is unconstitutional under the Constitution of the State of Indiana, and further under the Constitution of the United States of America.

3. That said tax is confiscatory as applied to Plaintiff, Four Winds, Inc., that said tax is a penalty tax as applied to said Plaintiff, that said tax is unfair as applied to said Plaintiff, and that said tax is inherently discriminatory as applied to said Plaintiff.

THEREFORE, said tax is unconstitutional as interpreted through the Constitution of the United States and of the Constitution of the State of Indiana, as applied to Plaintiff, Four Winds, Inc.

/s/ MICHAEL T. DUGAN, II
Judge Marion County
Superior Court Room No. 5

7-9-76

IN THE
MARION COUNTY SUPERIOR COURT
Room No. 5

STATE OF INDIANA } SS:
COUNTY OF MARION }

FOUR WINDS, INC. and AMBASSADAIR, INC.,
Plaintiffs,
vs.
INDIANA AERONAUTICS COMMISSION,
Defendant.

Cause No. S576-233

AMENDED ORDER

Comes now the plaintiffs, Ambassadair, Inc., and Four Winds, Inc., by counsel and the defendant, Indiana Aeronautics Commission, by counsel, and the Court having heard evidence under oath on the plaintiff's complaint, having consolidated said hearing without objection, under Trial Rule 65 (A) (2), and having considered defendant's Motion To Correct Errors filed herein, the Court now approved issues

(H. I.)

And further, pursuant to said Amended Findings Of Fact the Court now approved and issued the following Amended Conclusion of Law:

(H. I.)

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, the Public Law 68 enacted by the Indiana General Assembly 1975, IC 1971, 6-6-6.5-13, as applied to these plaintiffs is hereby declared unconstitutional and declared null and void under the Constitution of the State of In-

diana; and further that the preliminary injunction previously herein is now made permanent, and further that the Indiana Aeronautics Commission is hereby enjoined from enforcing the collection of the subject tax in accordance with Public Law 68 as to these plaintiffs.

SO ORDERED this 9th day of July, 1976.

/s/ MICHAEL T. DUGAN, II
Judge Marion County
Superior Court Room No. 5

IN THE
SUPERIOR COURT OF MARION COUNTY
Room No. —

STATE OF INDIANA } SS:
COUNTY OF MARION }

FOUR WINDS, INC.,
Plaintiff,
vs.
INDIANA AERONAUTICS COMMISSION,
Defendant.

Cause No. S576-233

COMPLAINT FOR INJUNCTION

Comes now the Plaintiff, Four Winds, Inc., an Indiana corporation, in person and by counsel, and does hereby file its verified Complaint For Injunction in the words and figures as follows:

1. That Plaintiff is an Indiana Not-For-Profit Corporation, organized and operating a private airplane travel club in the State of Indiana, and more specifically from Weir Cook Airport, Indianapolis, Indiana.

2. That said Plaintiff is the owner of one 1962 Convair airplane Model 880-22M, which is based and operated out of Weir Cook Airport, Indianapolis, Indiana.

3. That the Indiana General Assembly, during 1975, enacted Public Law No. 68, which requires the Aeronautics Commission of the State of Indiana to register and collect an excise tax on all aircraft based in the State of Indiana for 180 days per year or more, beginning with January 1, 1976.

4. That said Convair 880, above described, was acquired by the Plaintiff in this action during the Fall of 1975, for

the approximate price of Two Hundred and Twenty-Five Thousand Dollars ($225,000.00).

5. That under the classification of said excise tax, as published in Public Law 68 in the 1975 General Assembly, said aircraft is presently subject to payment of the excise tax on or before February 29, 1976, in the approximate amount of Eighteen Thousand and Six Hundred Dollars, ($18,600.00).

6. That comparative to other aircraft, with a much greater value, but a lesser weight, the excise tax payment due on those other planes would be substantially less than that due on the plane owned by Plaintiffs in this action, and further would have no relevancy whatsoever to the stated value, nor the number of flights made, nor the use of landing strips at various airports in the State of Indiana.

7. That Sections 12 and 13 of said Public Law 68, as enacted by the 1975 General Assembly, are unconstitutional as being in violation of the Fourteenth Amendment of the Constitution of the United States, in that it effectively deprives the Plaintiff in this action of property without due process of law, and further that it denies the Plaintiff in this action equal protection of the laws, and more specifically the taxation under said laws.

8. And, that Plaintiff further alleges that said Section 12 and 13 of Public Law 68, as enacted by the 1975 General Assembly, is unconstitutional under provisions of the Constitution of the State of Indiana, and further under the Constitution of the United States of America, by virtue that said excise tax as it applies to this Plaintiff would be an arbitrary and capricious application, and an unjust taking of property without any solid basis or foundation upon which said tax was enacted to be fair and equitable to all parties subject to said tax.

WHEREFORE, Plaintiff does hereby pray that a temporary restraining order be issued by this Court against the Aeronautics Commission of the State of Indiana, from enforcing said excise tax at this time, and further be restrained from disallowing said Plaintiff to operate its air-

plane without said registration statement as secured by the payment of said excise tax due February 29, 1976, in the approximate amount of Eighteen Thousand and Six Hundred Dollars ($18,600.00), and further that said Sections 12 and 13 of said Public Law 68, as enacted by the 1975 General Assembly, be declared unconstitutional and in violation of those guaranteed rights as above specified to this Plaintiff, and for all other relief proper in the premises.

BY: GLEN JONES
FOUR WINDS, INC.

STATE OF INDIANA
COUNTY OF MARION } SS:

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 27th day of February, 1976.

BECKY ANN RICHTER
Notary Public

My Commission Expires:
January 30, 1980
JAMES P. QUINN

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IN THE
INDIANA COURT OF APPEALS

No. 2-1076 A 375

INDIANA AERONAUTICS COMMISSION, *Appellant* (Defendant Below) vs. FOUR WINDS, INC. and AMBASSADAIR, INC., *Appellees* (Plaintiffs Below)	Appeal from the Marion County Superior Court Room No. 5 The Honorable Michael T. Dugan, II, Judge

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The plaintiff, Four Winds, Inc., requested an injunction against the Aeronautics Commission of the State of Indiana from refusing to register the aircraft owned by the plaintiff without the simultaneous payment of an excise tax unconstitutionally applying to the plaintiff's aircraft. The Court in effect allowed the plaintiff to continue its otherwise lawful operations under all applicable State and Federal regulations pending the outcome of this question at a hearing on the merits of the complaint.

The cause was heard on March 9, 1976, and the Court held that the statute as applied to the plaintiffs was unconstitutional. The tax specifically exempted all similar commercial operations except the two plaintiffs who were included by oversight as the director of the Indiana Aeronautics Commission readily testified. The tax was directed at the numerous small planes in use for general aviation purposes numbering between five and ten thousand aircraft many of which were avoiding the property tax assess-

ment entirely because they had no readily ascertainable base. The plaintiffs are operated under commercial provisions, and have a fixed and permanent base of operations from which flights are generated on a commercial basis to all parts of the world.

STATEMENT OF THE FACTS

The plaintiff, Four Winds, Inc., is an Indianapolis based flying club serving approximately 3800 members. It operates under specific Federal statutes under similar requirements for airline operations because of the similarity of equipment and function. The Club flys to various parts of the world and regularly schedules trips to Mexico, the Bahamas, the Virgin Islands and other places of interest.

The Indiana Aeronautic Commission prepared the legislation complained of and readily admitted in Court that the application of this tax to the specific plaintiffs in this case was not foreseen or desired and that they were victims of an oversight. The Director of the Commission testified the plaintiff's were not fairly treated by the application of the tax as it was applied by the formula complained of.

The testimony of all the witnesses agreed that the formula was unrealistic as applied to these plaintiffs in comparison with the other five to ten thousand aircraft taxed under the formula, and as to the thousands of commercial aircraft similar to the plaintiff's equipment which was completely exempted.

The testimony of Mr. Kazimier, the director of the defendant at the trial was so clearly and directly supportive of the position of the plaintiff's that no reasonable trier of the facts could have concluded otherwise than that the operation and effect of the tax was both invidious and discriminatory as applied to the plaintiffs. Indeed, nowhere in the transcript does Mr. Kazimier contend otherwise.

SUMMARY OF THE ARGUMENT

In *Wright v. Steers,* 179 N.E. 2d 721, 242 Ind. 582, the Court stated that the nature of a tax must be determined

by its operation and incidence, rather than by its title or designation made by the legislature. In the instant case, the operation of this excise tax had an invidious and discriminatory effect on the plaintiff's. The evidence clearly and overwhelmingly indicated that the two plaintiff's were not treated fairly as compared to all other similar commercial operations that were completely exempted from the tax, and that the sole reliance of the taxing formulas on weight alone was patently ridiculous as applied to the two plaintiff's, and not therefore a reasonable classification for taxing purposes.

ARGUMENT

The application of an excise tax in Indiana can generally not be challenged unless the tax works an invidious and discriminatory harm to the challenger. In this case that is precisely what Ind. Code 6-6-6.6-13 does.

The tax is in lieu of the ad valorem property tax and specifically directs that no aircraft taxable under the excise tax complained of will be assessed a personal property. Code 6-6-6.5-12.

The tax also provides that the excise tax imposed is to be the equivalent of an average property tax rate of nine dollars ($9.00) on each one hundred dollars ($100.00) of taxable value. In the case of the plaintiff's hereunder the tax, because it is related to weight and not value, approximates a rate about double the statutory rate, a *Constitutional Limitation.* 6-6-6.5-22.

The rate therefore, as applied to the plaintiffs is patently unconstitutional by operation of the statutory limitation on the excise tax. Code 6-6-6.5-22. The tax imposed by the excise tax was eighteen thousand six hundred dollars ($18,600.00) as compared to an approximate assessment of seven thousand two hundred dollars ($7,200.00) based on a value of two hundred twenty five thousand dollars ($225,-000.00) for the Convair 880. (TR128).

Mr. Kazimier, the Executive Director of the taxing agency admitted that the tax as applied to the plaintiff,

Four Winds, Inc. was not fair (TR 176-179). This fact is easily perceived from common knowledge, Using age and weight only to tax aircraft is ridiculous if you do not make other reasonable allowances for obvious differences in the classifications employed.

The Court's determination from the record that the tax complained of work an invidious and discriminatory burden on the plaintiff's herein should be clear from a general reading of the evidence in that the classification of Four Winds, Inc. and Ambassadair, Inc. is not reasonable and is arbitrary. Classifying these two planes in a general aviation category where it is obvious they operate in a commercial sense and with clearly commercial equipment is ridiculous.

In *Lutz v. Arnold,* 1935, 193 N.E. 84, 208 Ind. 480 it was held that any classification of the subject of taxation will be valid *if* it rests on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. In this case, it is evident that the Court felt the classification was not valid because it rested on age and weight only and ignored all reasonable basis of actual difference. Ind. Code 6-6-6.6-13 is unconstitutional as applied to the plaintiff, Four Winds, Inc., as working a denial of equal protection of the law in that the classification complained of is arbitrary and unrealistic as readily admitted by the director of the taxing authority itself.

CONCLUSION

The evidence presented in the trial Court clearly supports the findings of that Court and reasonable men could not argue otherwise. Therefore, the appellant has failed to show as a matter of law that the tax complained of is not working an invidious discrimination because such is not possible from any reasonable examination of the record.

Respectfully submitted,
HENRY Y. DEIN

IN THE
SUPREME COURT OF INDIANA

Cause No. 1276 S 492

INDIANA AERONAUTICS COMMISSION, *Appellant* (Defendant Below) vs. FOUR WINDS, INC. and AMBASSADAIR, INC., *Appellees* (Plaintiffs Below)	Appeal from the Marion County Superior Court Room No. 5 The Honorable Michael T. Dugan, II, Judge

BRIEF IN SUPPORT OF PETITION FOR REHEARING OF APPELLEE, FOUR WINDS, INC.

This Court has jurisdiction to modify or amend or vacate its October 31, 1977, opinion and decision upon the filing of the Petition for Rehearing of Appellee, Four Winds, Inc., within the time allowed by Rule AP. 11 of the Indiana Rules of Appellate Procedure. It is also stated in Bobbitt's *Indiana Appellate Practice and Procedure*, Vol. 2, Chapter 62, Page 24:

> "So long as an appeal Court retains jurisdiction of the appeal—and this is until the petition for rehearing is denied or dismissed, or until the time for petition for rehearing has expired, if no petition is filed—it has the authority to change its opinion or revise it in any manner it deems necessary to correct technicalities or change the reasoning or result to see that the law is administered fairly and justice is upheld, either on its own motion or at the suggestion of either party to the appeal."

Appellee contends that the Court in its opinion and decision erroneously overlooked the fact that the Indiana Aircraft Excise Tax Act of 1975, Ind. Code §§ 6-6-6.5-1

through 22 violates Article 10, Section 1 of the Indiana Constitution, which provides as follows:

> § 1. *Assessment and taxation.*—
>
> (a) The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation of all property, both real and personal. The General Assembly may exempt from property taxation any of the following classes:
>
> (1) Property being used for municipal, educational, literary, scientific, religious or charitable purposes;
>
> (2) Tangible personal property other than property being held for sale in the ordinary course of a trade or business, property being held, used or consumed in connection with the production of income, or property being held as an investment;
>
> (3) Intangible personal property.
>
> (b) The General Assembly may exempt any motor vehicles, mobile homes, airplanes, boats, trailers or similar property, provided that an excise tax in lieu of the property tax is substituted therefore.

This section does not permit an express exemption of any property from the general property tax rate other than that specifically named therein. *Wright v. Steers* (1962), 242 Ind. 582, 179 N.E.2d 721. This section further provides that where property is exempted, such property must be subject to an excise tax in lieu of the property tax.

Not withstanding the foregoing, in addition to a specific exemption for scheduled air carriers, the Act provides as follows:

• • •

> "The provisions of this chapter pertaining to registration shall not apply to the following:
>
> • • •

(e) An aircraft the owner of which is exempt from ad valorem personal property taxation under the laws of this State. . . ."

• • •

[IC 6-6-6.5-9 (e) (Burns 1976 Supp.)].

Appellee, Four Winds, Inc., would respectfully submit that the Court in its opinion overlooked this exemption. In considering such exemption it can only be concluded that the Act must fall as it attempts, in violation of the Constitution, to exempt property other than that set out in Article 10, Section 1, from taxation. *Wright v. Steers,* supra. No class of property can be exempted from taxation unless there is a specific exemption by law. *Stark v. Kreyling* (1934), 207 Ind. 128, 188 N.E. 680. This Court further stated in *Wright*:

"So long as the Constitution reads as it does, the legislature had no authority to exempt from the general property tax any property other than that specifically limited in Article 10, § 1. *Stark v. Kreyling,* supra; the *State ex rel. Tieman, et al. v. The City of Indianapolis* (1879), 69 Ind. 375, 35 Am. Rep. 223; *Miles v. Dept. of Treasury* (1935), 209 Ind. 172, 199 N.E. 372, 101 A.L.R. 1359, Appeal Dism. 298 U.S. 640, 56 S.Ct. 750, 80 L.Ed. 1372. . . ."

[*Wright v. Steers,* 179 N.E.2d, at 725.]

Article 10, Section 1 of the Indiana Constitution clearly states that airplanes may be exempt from the property tax; however, they may only be exempt where an excise tax is substituted in lieu thereof. The Indiana Aircraft Excise Tax Act of 1975, with the exemptions provided, clearly contravenes Article 10, Section 1 of the Indiana Constitution, and, therefore, must fall.

The Court included that the classification contained in the Act is reasonable and does not constitute a denial of equal protection. However, it reasoned, in support of this conclusion that the age-weight formula is defensible in

that it is an index of the extent to which an airplane may be expected to call upon facilities and services provided to the aviation community. However, a classification must be based upon substantial distinctions germane to the subject-matter and object to be attained. *Heckler v. Conter* (1933), 206 Ind. 376, 187 N.E. 878. Notwithstanding, the amount of tax imposed by the Act has no relation to the amount of use the taxable aircraft makes of the facilities benefited.

The Act must be held contrary to the Fourteenth Amendment of the United States Constitution and Article 1, Sections 12 and 23 of the Indiana Constitution if it proposes or results in such inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation. *Dane v. Jackson* (1921), 256 U.S. 589, 65 L.Ed. 1107, 41 S.Ct. 566.

It is patently obvious that exempted aircraft and those paying a substantially smaller tax liability under the Act use airport facilities substantially more than Appellees herein. The testimony in the Trial Court below revealed that scheduled air carriers (exempted aircraft) constitute 95.5% of the total use of airport facilities.

It can readily be seen that Appellees are bearing a tax burden which has no relation whatsoever to benefits received; it, therefore, can only be concluded that Appellees have been denied equal protection of the law and their property was taken without due process of law. See *Wisconsin v. J.C. Penney Co.* (1940), 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267.

It was appropriately stated in *Morton Salt Co. v. City of South Hutchinson* (10th Cir. 1947), 159 F.2d 897, at page 901:

". . . The test of due process, save the Courts, is whether the taxing power exerted by the State bears fiscal relation to . . . benefits given . . . in other words, the query is, what has the State given for which it may ask return. *Wisconsin v. J.C. Penny (sic) Co.,* supra. If the tax imposed

> clearly results in such a flagrant and palpable inequality between the burden imposed and the benefit received that it amounts to an arbitrary taking of property without compensation, it is said to violate the due process guarantee under the Fourteenth Amendment. All of the cases which have affirmed the broad powers of taxation have recognized these limitations, i.e. see *Dane v. Jackson*, supra; *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 614 19 S.Ct. 553, 43 L.Ed. 823; *Houck v. Little River Dist.*, supra Cooley, Sec. 144. . . ."

The result obtained with the rendering of the opinion and decision herein is that Appellees have been denied equal protection and due process of law; and may not own and operate their own aircraft as private persons without being subjected to a severe penalty, furthermore, the Indiana Aircraft Excise Tax Act of 1975 while contravening the Indiana Constitution, Article 10, Section 1, has not been stricken down.

In light of the foregoing, Appellee, Four Winds, Inc., requests that the Court grant a rehearing in the above-entitled cause, and to correct its opinion and decision rendered therein.

Respectfully submitted,

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